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No. 90-1738

In The

Supreme Court of the United States

October Term, 1990

PACIFIC POWER & LIGHT COMPANY, et al.,

Petitioners,

vs.

MONTANA DEPARTMENT OF REVENUE, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Montana Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Does Montana's tax of the Petitioners' private, for profit use of electrical transmission lines owned by a federal agency, violate the Supremacy Clause, the Commerce Clause, or the Fourteenth Amendment when:

1. Montana taxes similarly situated users of state-owned property and federal-owned property in the same manner, e.g., it exempts both the private users of state-owned railroad rights-of-way and the private users of federal-owned railroad rights-of-way from beneficial-use taxes?

2. The Petitioners pay less beneficial-use taxes on the lines they use than they would if they owned such lines outright?

3. The Petitioners have the firm contractual right to use the power lines to the exclusion of all others for the entire life of those power lines?

4. The Petitioners are assessed based on the value of this firm contractual right?

5. Two of the Petitioners are the largest electrical utilities in Montana and sell the power transmitted over the lines to Montanans?

6. There is no expressed or implied act of Congress which preempts Montana's right, as recognized by this Court, to tax the private for profit use of federal property?

LIST OF PARTIES AND RULE 28-2.1 STATEMENT

The undersigned, counsel of record for Montana Department of Revenue, certifies that the following parties have an interest in the outcome of this case as Respondents:

State of Montana
Jefferson County Government, Jefferson County, Montana
Broadwater County Government, Broadwater County, Montana
Powell County Government, Powell County, Montana
Granite County Government, Granite County, Montana
Mineral County Government, Mineral County, Montana
Missoula County Government, Missoula County, Montana
Sanders County Government, Sanders County, Montana
Montana University System
Montana Office of Public Instruction

The parties having an interest in the outcome of this case as Petitioners are:

Pacific Power & Light Company
Portland General Electric Company
Puget Sound Power & Light Company
The Washington Water Power Company
The Montana Power Company

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

On May 21, 1991, pursuant to Rule 30, the Clerk of this Court extended the time within which the Respondents had to file this brief in opposition through June 21, 1991.

The Respondents, the Department of Revenue of the State of Montana, seven Montana counties, their respective Treasurers, and the Montana State Superintendent of Public Instruction, respectfully request this Court deny the petition for a writ of certiorari to the Montana Supreme Court to review its decision in *Pacific Power & Light Co., et al. v. Montana Dept of Revenue, et al.*, ___ Mont. ___, 773 P.2d 1176 (1991) (*"Pacific II"*).

OPINIONS BELOW

This is the third time the Petitioners have presented the same facts and issues to this Court. The two prior cases were *Pacific Power & Light Co. v. Montana Dept. of Revenue*, 237 Mont. 77, 773 P.2d 1176 (1989), *cert. denied*, 110 S. Ct. 853 (1990), Pet. App. A58 (*"Pacific I"*), and *Portland Gen. Elec. v. Montana Dept. of Revenue*, 237 Mont. 324, 773 P.2d 1189 (1989), *cert. denied*, 110 S. Ct. 853 (1990), Pet. App. A83 (*"PGE"*). All the issues properly raised in this case were raised in those prior Petitions. This case does not raise any new issues or facts.

The first issue which the Petitioners claim is new, "that the state's exemption of its own property from beneficial use taxation violated the prohibition against

states' discriminating against the federal government or those with whom it deals", was raised by the Petitioners as issue no. 3 in *Pacific I* and no. 4 in *PGE*.

The second and third "new" issues, Petitioners' claims that Montana's assessment method is discriminatory, are not ripe for consideration by this Court. They are not ripe because the Montana courts did not address those issues. The Montana courts did not address them because the Petitioners have not exhausted their pending administrative remedies.

Petitioners' statement of the issues in *Pacific I* are reprinted at Resp. App. A2. Petitioners' statement of the issues in *PGE* are reprinted at Resp. App. A4-5.

In *PGE* this Court asked the Solicitor General to express the views of the United States. The Solicitor General's brief is reprinted at Resp. App. A6-25. In that brief the Solicitor General asked this Court to deny the *Pacific I* and *PGE* petitions.

Prior to trial the District Court made several rulings which are critical to this Petition. Those decisions show that the Petitioners' contest of the assessment method (the second and third "new" issues) are not ripe for review by this Court. The issues are not ripe because these rulings did not allow the Petitioners to raise these issues in this case. The decisions are: an Order denying Petitioners' Motions to Amend Their Complaints, Resp. App. A26; an Order Granting Defendants Motion for Summary Judgment, Resp. App. A28; an Order Re Plaintiffs' Motion for Stay; Resp. App. A32; and a Pretrial Order, Resp. App. A35.

STATEMENT OF THE CASE

A. The Facts.

The facts will be discussed in the argument. The facts for these cases also were concisely and objectively set out by the Solicitor General in his *PGE* brief. Resp. App. A9-14. The Montana Supreme Court in *Pacific I* Pet. App. A59-61, *PGE*, Pet. App. A84-88 and *Pacific II*, Pet. App. A11-14. The facts in *Pacific I* and *PGE* are the same as the facts in this case.

B. The Proceedings in State District Court.

Before the District Court the Petitioners tried to amend their complaints to include attacks on the method used to assess the tax. The District Court denied the amendments because, under Montana law, the assessment method first must be presented to the Montana State Tax Appeal Board (STAB) before review by the District Court.[1] Resp. App. A27. Indeed, those issues were addressed by the Montana State Tax Appeal Board in a recent decision which is currently on appeal to the Montana District Court. That decision is Pet. App. A92-114.

The District Court dismissed the Petitioners' case on the remaining issues for lack of proof.[2]

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[1] STAB is a three member, independent quasi-judicial body appointed by the Governor and confirmed by the Montana Senate for fixed terms. It was created by Art. VII, § 7 1972 Montana Constitution. STAB has specific expertise in property valuations and assessment methods.

[2] "Thus, due to lack of evidence proving Plaintiffs' claims . . . this Court finds that Plaintiffs have not sustained their burden of proving that the imposition of beneficial use taxes . . . violates any statutory or constitutional rights." Pet. App. A56-57.

C. The Montana Supreme Court Decision.

Before the Montana Supreme Court the Petitioners argued their case based upon the trial record. The Montana Supreme Court affirmed the District Court stating: "The District Court held that the [Petitioners] had not sustained the burden of proving that the assessment of the beneficial use taxes had violated any statutory or constitutional rights. We affirm."[3] Pet. App. A12.

The Petitioners failed to prove their case. This is demonstrated by their Petition for Rehearing when they attempted to submit affidavits to prove new "facts." Pet. App. A21-46.

The Montana Supreme Court gave this case a complete review based on the record developed by the Petitioners at trial.[4]

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[3] The party attacking the statute has the burden of establishing the invalidating facts on which the claim is based. See, e.g., *Mullaney v. Anderson*, 342 U.S. 415 (1952) and *Fay v. People of State of New York*, 332 U.S. 261 (1947).

[4] State or federal appellate courts are not trial courts. They are not in the position to retry a case. Courts have uniformly rejected Petitions for Rehearing based on matters outside the record. See, e.g., *United States v. Maxwell Land-Grant Co.*, 122 U.S. 365 (1887). After failing to develop a record on this issue, the Petitioners cannot complain that the Montana Supreme court erred because it relied upon the only record properly before it.

REASONS WHY THE PETITION SHOULD BE DENIED

Summary of Argument

The Montana Supreme Court decisions in *Pacific I*, *Pacific II*, and *PGE* do not conflict with any opinion of this Court, federal circuit court of appeals, federal district courts, or the highest courts of any other state. The law on the issues presented by the Petitioners is settled. The Montana Supreme Court applied established law to the facts in this case.

As the Solicitor General stated in his *PGE* amicus brief, "[b]ecause the Montana Supreme Court's decision rests on highly specific factual grounds and does not appear to present an issue of recurring significance, we [the United States] do not believe that review by this Court is warranted." Resp. App. A14. The basic facts and issues have not changed from those presented in *Pacific I* and *PGE*.

This Court has repeatedly held that a State may tax the private use of property owned by the United States. The Montana beneficial use tax, § 15-24-1203, MCA, is just such a tax. Under that law, Montana taxes the Petitioners' firm, long term, exclusive, contractual right to use power lines owned by the Bonneville Power Administration (BPA). They use these lines to transmit their power for their own commercial profit-making activities. This tax does not discriminate against the United States or those with whom it deals. The United States does not directly or indirectly pay the tax.

Montana's tax does not discriminate because it is imposed upon similarly situated users of all types of tax exempt property including property owned by state and

local governments and churches. The five Petitioners include the two largest providers of electric power in Montana. The power that flows across the BPA lines is used by Montanans and non-Montanans. The ultimate economic burden of this tax falls equally on Montanans and non-Montanans; therefore, the tax does not violate the commerce clause or 15 U.S.C. § 391 ("Anti-Discrimination Act"). No act of Congress expressly or implicitly preempts Montana's taxation of the Petitioners' beneficial use of the BPA's transmission lines.

The Petitioners' challenge to the method used to calculate their taxes is not ripe for review because the Montana courts declined to hear that issue. *New York Times Co. v. Jascalevich,* 439 U.S. 1316 (1978). The Montana courts deferred instead to the pending case before STAB. That STAB case is now on review in the Montana judicial system. The method for assessing the Petitioners was not fully developed before the District Court in this case because of its procedural rulings. The record is simply too incomplete for a constitutional review of such a complex factual issue as property tax assessment methods. Indeed, a fully developed record would show that the Petitioners are paying less tax proportionately than other taxpayers in Montana.

A. The Montana Beneficial Use Tax is Constitutional.

As the Solicitor General noted this is a unique situation and a unique case. This is a case with little national impact because it is so unique.

Montana imposes ad valorem property taxes on property owned by individuals and corporations. This property tax applies to utilities; it specifically includes "electric power or transmission lines." § 15-23-101(2), MCA (1989). Montana also imposes a general beneficial use tax on private users of tax-exempt property. The tax is on the "possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation." § 15-24-1203, MCA (1989). This is the statute in controversy. This law, with the most recent amendments which retroactively apply to the years in controversy, is reprinted at Resp. App. A41-42.

The basic facts omitted by the Petitioners are set out by the Montana Supreme Court in *Pacific I* and *PGE*. In the 1970's the Petitioners needed 500 kilovolt transmission lines to transmit electricity from coal fired generating plants in eastern Montana to electrical consumers in western Montana and the west coast. Pet. App. A59. They constructed a 150 mile transmission line from these plants to a point just south of Townsend, Montana. *Ibid.*

At the Petitioners' request, the BPA built the remaining portion of the line from Townsend to the Idaho border. This 500 kilovolt line was designed to transmit the Petitioners' private electricity. It is one continuous line with no substation or other break where ownership changes from the Petitioners to the BPA. Id. at A60. Because the BPA is a federal agency, the BPA's portion of

this transmission line is exempt from Montana's ad valorem property tax.[5]

The Petitioners entered into long-term contracts with the BPA. Those contracts guarantee them the "firm contractual right" to transmit power over the BPA lines for the entire economic life of those lines. Pet. App. A85. "[T]he power flowing through the lines remain[s] under [petitioner's] ownership" and the Petitioners "pay for the use of the lines regardless of the actual transmission flow." Pet App. A89. "[T]he reservation of firm transmission demands grants [the Petitioners] an exclusive right" to use of the lines. Pet. App. A89. Clearly, the Petitioners beneficially use the lines; they possess and control the facilities sufficiently to submit them to taxation on that use. Pet. App. A64-65. Under the contracts, the BPA will recover all the direct and indirect costs of building and operating the transmission lines. Pet. App. A65. The BPA does not directly or indirectly pay the tax. Pet. App. A76.

The law on the taxation of the beneficial use of federal property was succinctly stated in the Solicitor General's *PGE* amicus brief:

> Under settled principles of intergovernmental immunity, it is well established that, in the absence of congressional consent, a State cannot impose a tax directly on the United States (*United States v. New Mexico*, 429 U.S. 720, 733 (1982)); cannot impose a tax that operates to discriminate against the United States or those

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[5] The ". . . . " portion of the 500 kilovolt transmission line illustrated on the map on page 2 of Petitioners' brief is owned by the Petitioners. The "___" portion of the map's transmission line is owned by the BPA.

> with whom it deals (*Washington v. United States*, 460 U.S. 536, 540 (1983)). *It is equally well established, however, that "a State may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed." United States v. County of Fresno*, 429 U.S. at 462. Such a tax must be nondiscriminatory (id. at 464, . . .), and it must not exceed the private party's interest in the federally owned property (*United States v. County of Fresno*, 429 U.S. at 462-463 n. 10 . . .) (Emphasis supplied.) Resp. App. A15.

The Solicitor General also said that the Montana Supreme Court correctly applied these well settled principles to the unique facts in *Pacific I* and *PGE*. Resp. App. A15-17.

This Court recognizes that "[t]he privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937). "The use [of federal property] by a contractor for his own private ends – in connection with commercial activities carried on for profit – is a separate and distinct taxable activity." *United States v. Boyd*, 378 U.S. 39, 44 (1964). This Court recognizes that these taxes prevent unfair trade advantages accruing to private users of exempt properties over their competitors who must pay ad valorem taxes on similar, privately held properties. *United States v. County of Fresno*, 429 U.S. 452, 463 (1977).

The Petitioners do not "actually 'stand in the Government's shoes.' " *United States v. New Mexico*, 455 U.S. 720, 736 (1982). They are not instrumentalities of the United States. They are not agents for the United States. As the

Solicitor General noted in footnote 11 of his brief, the legal and economic incidents of Montana's beneficial use taxes do not fall upon the United States. Resp. App. A24. Also see *Fresno*, 429 U.S. 452. The Federal government has a neutral attitude on this tax. Neither the BPA nor the United States have intervened in this litigation, although they have known about it for over 7 years.[6]

B. The Montana Beneficial Use Tax Does Not Discriminate Against Those Who Contract With the Federal Government or Against Interstate Commerce.

This issue was previously presented to this Court as Issue No. 4 in *PGE* and as part of Issues No. 1 and 2 in *Pacific I*. Contrary to Petitioners' assertion, this issue is not a new issue. The claims of discrimination are based on the Supremacy Clause and the Commerce Clause. On those claims the Solicitor General stated: "As with the petitioner's challenges under the Supremacy Clause and the Commerce Clause, the Montana court's Fourteenth

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[6] As the Solicitor General stated in footnote 6 of his *PGE* brief, "[t]he federal government, moreover, has not been a party to the litigation in the Montana courts; as a result, the federal government has not contributed to the development of the record as a party, and did not present its views of the intergovernmental immunity issue to the lower courts. By contrast, the two recent federal decisions relied on by petitioner (Pet. 9-10) were cases in which the federal government contributed to the development of the record as a party and presented its views of the intergovernmental immunity issue to the lower courts." Resp. App A18-19.

Amendment analysis rests on the particular factual findings in this case, and does not require this Court's review." Resp. App. A24.

1) The Montana Tax Does Not Discriminate Against Those Who Contract with the United States.

The record shows Montana taxes the beneficial use of all types of tax-exempt property including property owned by the state, local governments, churches and the federal government.[7] Excerpts of that record are reprinted as Resp. App. A45-65.

The Petitioners contend that the Montana beneficial use tax is unconstitutional because Montana does not tax the beneficial use of state-owned railroad right-of-way or track when used exclusively for "rail transportation." This issue is not new; it was raised as issue no. 3 in *Pacific I* and issue no. 4 in *PGE*.[8]

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[7] For example, the record shows that Department is assessing non-railroad users of state owned property along the CMR and RARUS lines. Pl. Exh. 225P, p. 144. Resp. App. A57.

The record also shows that local assessors are taxing the beneficial use of property owned by the state and subdivisions of the state, e.g., the beneficial use of the industrial park owned by the City of Great Falls, and churches. For example, Pl. Exhibit 248P, p. 15, Resp. App. A61-65.

[8] Both issues were "[m]ay Montana taxing authorities constitutionally impose beneficial-use property taxes on – those it has determined to be users of federal electric power transmission facilities, but at the same time exempt users of facilities owned by the State of Montana from such beneficial-use taxes?"

Montana taxes "similarly situated users" of federal property the same as "similarly situated users" of state property. *Phillips*, infra. During the time in controversy, both the users of state-owned and federal-owned track and railroad right-of-ways were exempt from taxation.[9] They were exempt as long as the track and right-of-way was used exclusively for "railroad transportation". Users of federal-owned railroad track and right-of-ways and users of state-owned track and right-of-way are taxed the same. The exemption of the users of state-owned and federal-owned railroad right-of-ways and track does not give the users of electrical transmission lines a right to be exempt from taxation.[10] Electrical transmission lines are not railroad tracks.

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[9] The law applicable to the years in question as retroactively amended in Chap. 621, L. 1991 provides: "*The tax may not be imposed upon the possession or other beneficial use of railroad right-of-way or tracked* **owned by the United States** or acquired by the state pursuant to Title 60, chapter 11, part 1, as long as the state or the United States retains ownership and the right-of-way or track is used exclusively for rail transportation." (Emphasis supplied.)

[10] This Court has held: "[a] legislature has a wide range of choice in classifying and limiting the subjects of taxation." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937); and "the states . . . in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate – these are among the powers of taxation and of constitutional law." *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 368 (1940).

In their brief petitioners failed to state that Montana taxes the beneficial use of state-owned railroad right-of-way or tracks when not used for "rail transportation." Montana also taxes the use of all the state-owned improvements, e.g., buildings, on the right-of-way used by the railroad. See the decision of the State Tax Appeal Board in *Central Montana Railroad v. Department of Revenue*, SPT-1988-13, March 20, 1990. Resp. App. A66. Also see Resp. App. A72-111 for the assessors' lists of users of state-owned railroad right-of-ways and tracks which were taxed under the Montana beneficial use tax during the time in controversy.

The Montana courts in *Pacific I*, *PGE*, and *Pacific II* followed the guidelines set out in *United States v. City of Manassas*, 830 F.2d 530 (4th Cir. 1987) aff'd, 108 S.Ct. 1568 (1988) and *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376 (1960) and correctly applied those standards to the facts of the case. See, e.g., Pet. App. A48-82.

After not producing any evidence on this issue before the Montana courts, the Petitioners want to try this issue before this Court upon a new record created by affidavits. This Court has said, "[w]e do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925).

2) The Montana Tax Does Not Discriminate Against Interstate Commerce.

This Court has consistently held that "interstate commerce may be made to pay its way" by the states. *Complete Auto Transit v. Brady*, 430 U.S. 274, 281 (1977).

The facts show there is no discrimination. Two of the five Petitioners, Montana Power Co. (MPC) and Pacific Power & Light Co. (PP&L) are intrastate companies. MPC sold the electrical power transmitted over the BPA line throughout Montana. PP&L sold the power it transmitted over the BPA line, including the Garrison to Taft portion of the line, to customers in northwestern Montana. In *Pacific I* the Montana court found that "MPC and PP&L used the power to service Montana customers and were assessed and taxed in the same manner as the other users of the lines." Pet. App. A68. The burden of the Montana beneficial use tax falls equally upon interstate and intrastate commerce.

The Petitioners contend that the method of assessment imposes disproportionate and discriminatory taxes on them because it "erroneously assumes that all power owned by Petitioners flows over federal facilities and none over nontaxable federal facilities."[11] Pet. Br. i. The District Court and the Montana Supreme Court did not address that issue because that issue was part of the

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[11] The Petitioners did not accurately describe the assessment method in their footnote 27. For example, the Montana Supreme Court stated: "These bi-directional lines are capable of transmitting electrical power in either direction, however, they are not capable of transmitting power in both directions simultaneously . . . In negotiating the [contract], the [Petitioners] and BPA provided for maximum firm transmission demands, East to West, of 1,915 MW." Pet. App. A66. The assessment method is based on what is actually taking place under the BPA contract.

pending STAB proceedings. The issue is being reviewed by Montana courts as part of the review of STAB's decision on the assessment method. As the Montana Supreme Court stated "because these issues were brought before STAB, they must be first dealt with at that level." Pet App. A19. See *Weinberger v. Salfi*, 422 U.S. 749 (1975).

The Montana courts also did not address the "power flow" issue because it was decided in the *PGE* decision. The issue was issue no. 5(1) raised in the *PGE* petition to this Court.

Montana does not assess the tax based on the flow of electrical power. The tax is imposed on the contractual right to use the BPA lines, that is, the privilege of using the property. In *PGE* the Montana Supreme Court stated:

> It is not disputed that the DOR did not rely on actual transmission flows. Rather, the assessment was based exclusively upon PGE's Garrison-West Agreement with the BPA providing for firm transmission rights. To eliminate any influence of 230 KV lines in the assessment, the DOR requested BPA to provide detailed information regarding the actual cost of the installed Hot Springs lines located within the State of Montana, and information regarding the total capacity of the lines and date of installation. . . .
>
> Reviewing the facts, we conclude that *the tax was imposed on the privilege of using the property.* The assessment reflects PGE's contractual reserve arrangement with the BPA, thereby ignoring actual flows and lines' west to east transmission capacity. (Emphasis supplied.)

Pet App. A90-91.

C. Montana Assessment Methods Do Not Present a Constitutional Question.

1) This Issue is Not Properly Before This Court

The Montana courts declined to hear the Petitioners' allegation that the tax "imposes higher beneficial-use taxes on Petitioners for the portions of the lines used than they would have paid had they owned such portions outright." The Petitioners complain about the "50% at the bottom" or "50% weighting" method of assessing their beneficial use of the BPA lines. On that issue Montana Supreme Court held:

> The final issue deals with a revision of assessment methodology [the "50% at the bottom" method]. As the District Court stated in its denial of the Colstrip Owners' [Petitioners'] Motion for Leave to File First Amended Complaints, under § 15-8-601(3)(c), MCA, challenges to revisions in assessments must be made by appeal to STAB. This District Court correctly refused to hear this issue and, therefore, we will not hear it either. *Once the issue has been brought before STAB a proper judicial review will then be available to the appellants.* (Emphasis supplied.) Pet. App. A20.

The "50% at the bottom" or "50% weighting" method was an issue in STAB's decision in *Pacific Power & Light Co., et al. v. Dept. of Rev.*, Nos. SPT-1988-4 through 11 and 1989-4 (Aug. 30, 1990). That decision is reprinted as Pet. App. A92-115. It is currently on appeal to the Montana First Judicial District Court in *Pacific Power & Light Co., et al. v. Dept. of Rev.*, Cause No. CDV-91-133, Montana First Judicial District Court, Lewis & Clark County.

2) Montana Does Not Impose Greater Taxes on the Petitioners than Are Imposed on Other Taxpayers

As the Solicitor General noted in his *PGE* amicus brief: "Petitioner's objections to the valuation methodology actually employed by the State ([*PGE*] Pet. 22-24), moreover, present factbound issues that do not merit this Court's review." Resp. App. A22.

The Petitioners present this issue in the hypothetical because, as a result of the Petitioners' failure to exhaust their pending administrative remedies, the record is incomplete on this issue. Those facts that are in the record do not support the contentions of the Petitioners. For example, the Petitioners failed to point out that the 1986 value of the Garrison to Taft portion of the BPA line was $184,000,000 and that, as a result of the "50% at the bottom method," the taxable value of their interest in this line was set at $61,000,000 (Def. Exhibit 52; Thane Tr. p. 381). The Petitioners were taxed on only one third the value of the BPA line despite the fact they had almost exclusive use of the line.

This Court has approved using the "full value" of the federal government's property in computing the beneficial use tax.[12] See *Offutt Housing Co. v. County of Sarpy,*

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[12] § 15-8-111, MCA, provides: "All taxable property must be assessed at 100% of its market value except as otherwise provided." There is no special exception for the assessment of the beneficial use of tax exempt property.

351 U.S. 253, 261 (1956) and *United States v. City of Detroit*, 355 U.S. 466, 470 (1958). In the *PGE* case the Montana Supreme Court also held, "the State had the statutory right to tax [Petitioners] based upon the full value of the facilities." Pet App. A66. Clearly, an assessment method which results in an assessed value of 1/3 the full market value is not unconstitutional.

The portion of the 500 kv transmission line which the Petitioners own is assessed by Montana using the unitary method at 100% of its market value as required by Montana law.

The "half at the bottom" methodology is not unique to the Petitioners' beneficial use tax. This method has been used to assess private property owned by other electrical utilities. See, e.g., *Puget Sound Power & Light Co. v. Department of Revenue*, 761 P.2d 336 (Mont. 1988).

How can the Petitioners be unconstitutionally taxed if they are paying less than half the tax that other taxpayers are paying? How can the Petitioners be unconstitutionally taxed if they are paying less than half the tax that they are paying on their own portion of this continuous transmission line?

D. Congress Has Not Preempted Montana's Taxation of The Petitioners Beneficial Use of BPA Transmission Lines.

This issue was also raised in *Pacific I* and *PGE*. First, the Petitioners allege Montana's beneficial use tax violates 15 U.S.C. 391. That law provides that "[n]o State * * * may impose or assess a tax on or with respect to the

generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity." The statute states, a tax as "discriminatory" if "it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." (Ibid.). Since MPC and PP&L pay the same tax as the other three electrical utilities, the tax burden on intrastate electricity is the same as that on interstate electricity. That federal law is not being violated.

Second, the Petitioners contend that taxation is preempted by section 7(m) of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839 e(m).[13] The Solicitor General succinctly addressed this question in footnote 8 of his brief:

> Petitioner fails to cite any evidence, however, in either the language of the statute or its legislative history, to support its suggestion that Congress intended the impact aid payments to pre-empt the imposition of otherwise permissible beneficial use taxes. Resp. App. A20.

This Court says that preemption analysis begins with a presumption that Congress does not intend to preempt

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[13] Any uncertainty about this issue is put to rest by the legislative history. Representative Dingell, in his summary of section 839(m) stated, "[t]he intent is to make these payments reflect the services provided by the government and not any taxes that may have been lost or estimated to have been lost by the communities. This is not a payment-in-lieu-of-taxes provision." (48 Fed. Reg. 55765).

state law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). Absent clear Congressional intent, preemption can not be implied. (Ibid.)

CONCLUSION

In the present case, Petitioners only raise questions turning entirely on the facts of this case, already resolved twice in favor of Respondents, and without any impact outside the limits of this case. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be **denied.**

Respectfully submitted,

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